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SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 188

JAMES C. DAVIS, Federal Agent, et al., Petitioners,

vs.

Mrs. MARY PRESTON, Administratrix.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

SIDNEY F. ANDREWS,
W. L. COOK,
Counsel for Petitioner.

(34,319)

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SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. 188

JAMES C. DAVIS, FEDERAL AGENT, ET AL., PETITIONERS,

vs.

MRS. MARY PRESTON, ADMINISTRATRIX, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Federal Agent designated by the President of the United States to wind up the affairs of the United States Railroad Administration and Fidelity & Deposit Company of Maryland, surety on the appeal bond, respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The Petitioners are the Federal Agent appointed by the President of the United States to wind up the affairs of the United States Railroad Administration

and his surety on the appeal bond, Fidelity & Deposit Company of Maryland. At the time of the trial, the Federal Agent was James C. Davis. Notwithstanding his retirement, and because the judgment stands against him in his official capacity, the cause is presented in his name. It is claimed adversely that the Act of March 3, 1923, 42 Stat. L., 1443, has full application, relieving the case of all embarrassment concerning the necessity of substituting the successor Federal Agent. This contention, however, gives rise to one of the important questions presented.

The Respondent is Mrs. Mary Preston, Administratrix of the estate of her deceased husband, W. P. Preston.

The action as finally carried to judgment was under and pursuant to the provisions of the Federal Employers' Liability Act, approved April 22, 1908 (35 Stat. 65, C. 149; Comp. Sections 8657-8665), to recover damages for the benefit of Mrs. Preston as the surviving widow of the deceased. The employer of W. P. Preston at the time he met his death was the Director General of Railroads, operating the properties of Houston Belt & Terminal Railway Company under the authority of Congress. Preston met his death in a switch yard in Houston, Harris County, Texas, on September 15, 1919, his death having been caused by his being run over and crushed and dragged beneath a certain car or cars engaged in interstate commerce and being handled by Preston and others of his switching crew in furtherance of such commerce. The petition (R., 2 *et seq.*; Amended R., 12) did not set forth the

fact that Preston was engaged in interstate commerce, but it came out in the evidence on the trial and with leave of the Court after all parties had rested, a trial amendment was filed, whereby Mrs. Preston as Administratrix appeared in the cause, setting forth that the deceased was engaged in interstate commerce, and asking for recovery accordingly (R., 20).

The essence of the cause of action is "that defendant, his agents, servants and employees, had placed immediately adjacent to the track on which said cars were being switched, a number of steel rails and so close to the said track that when said W. P. Preston, in getting off of the moving cars at the McKinney Street crossing, without knowing that said rails were there, stepped on and among the same, which caused him to trip or slip, thereby throwing him under said moving cars, causing his immediate death." Upon these allegations further averments of negligence of the employer in failing to provide a safe place to work and in failing to warn Preston concerning the rails and obstructions were set forth in the petition (R., 14).

Suit was filed on February 26, 1920, against "Walker D. Hines, Director General of Railroads" (R., 2). The suit remained inactive until May 31, 1922, when Mrs. Preston, suing individually and not as Administratrix, filed and presented a motion for substitution of James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. This motion was opposed because of the lapse of time and on two grounds specifically, that the Act of February 8, 1899, prevented the substitution after lapse of one year, and

that, in any event, this substitution could not, under the circumstances, be accomplished after the lapse of two years subsequent to the termination of Federal control (R., 8-9). The motion was, however, granted on May 31, 1922 (R., 10). The same grounds as were presented in objection to the substitution were again brought to the attention of the Court by the defendant, James C. Davis, Federal Agent, through the medium of a plea in abatement, filed November 5, 1922, but this was overruled (R., 10-11).

In addition to the foregoing, James C. Davis answering in the cause, presented a general demurrer and general denial and pleas of limitation arising, not only under the Federal Employers' Liability Act, but also under the Transportation Act of 1920 (R., 15 *et seq.*).

After the parties had rested, plaintiff's attorneys discovered their oversight in not having qualified Mrs. Preston as administratrix and in not having her intervene in that capacity in light of the controlling effect of the Federal Employers' Liability Act. Hence, leave to file a trial amendment was requested and granted and the complexion of the case was changed to that extent. In answering the trial amendment, the defendant reiterated the previous objections based on the failure to substitute the Federal Agent in time, and also specially excepted to the trial amendment, because it showed upon its face that Mrs. Mary Preston as Administratrix had appeared in the cause suing James C. Davis, Federal Agent, for the first time more than two years after termination of Federal control

(R., 21-2). Defendant, however, adopted in its answer to the trial amendment the other pleas found in its answer to the amended original petition (R., 23).

The cause was submitted to the jury November 29, 1922, following which a verdict was returned and received, and upon the verdict the Court entered a judgment against James C. Davis, Federal Agent, in the sum of three thousand seven hundred fifty dollars ($3,750.00), with interest and costs (R., 34). The cause was duly appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, but by the order of the Supreme Court of Texas, acting under statutory power, the case was transferred to the Ninth Supreme Judicial District of Texas, at Beaumont. It was there heard and the judgment of the District Court was affirmed (R., 86). The appellant regularly filed his motion for rehearing, setting up all of the grounds presented in this petition and others, which motion was overruled by the Court of Civil Appeals on May 5, 1924.

Thereafter, on June 28, 1924, your Petitioner filed his petition for a writ of error, requesting the Supreme Court of Texas to review the action of the Court of Civil Appeals, therein setting forth all of the questions now involved in this petition. The writ was granted and the cause regularly heard by the Supreme Court of Texas, which handed down its decision on March 27, 1929, also affirming the judgment of the trial court and of the Court of Civil Appeals (R., 131-136). Your Petitioners filed their motion for rehearing with the Supreme Court of Texas April 10, 1929,

setting forth all the questions involved herein. Said motion was overruled on April 24, 1929 (R., 136). The Supreme Court of Texas is the Court of last resort in that State and from its final judgment Petitioners now seek relief, relying upon the reasons presently shown and presenting this petition pursuant to the provisions of Section 237, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 937; U. S. C. A., Title 28, Section 344).

Reasons Relied On for the Allowance of the Writ.

In the State courts Petitioner set up and claimed certain rights, privileges and immunities under certain statutes of the United States, which said privileges and immunities are invaded and denied by the adverse judgment of the Supreme Court of Texas herein, to wit:

1. This action being one cognizable under the Federal Employers' Liability Act approved April 22, 1908 (35 Stat. 65, C. 194, Comp. St. Sec. 8657, 8665), it appears, upon consideration thereof, that the rights and obligations of the Petitioner depend upon that Act and applicable principles of common law as interpreted by the Federal courts. Just as held in *Chicago, M. & St. P. Ry. Co. vs. Coogan,* 271 U. S. 472, 46 Sup. Ct. Rep. 564, Petitioner here contends that as a matter of law the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death upon which the action is predicated. The circumstances are closely similar to those set forth in

the opinion of Mr. Justice Butler in the Coogan case.

Decedent, W. P. Preston, was found dead on or adjacent to the tracks of Houston Belt & Terminal Railway Company at Houston, Texas, on February 15, 1919, said tracks then being controlled and operated by the Director General of Railroads. There was no eye-witness to his death and resort was had to circumstances to support the inference of negligence as a proximate cause of said death, it being claimed that negligence by the Director General consisted in furnishing an unsafe place to work, in that there was a loose steel rail constituting an obstruction where Preston attempted to alight from the string of cars.

The proof is found entirely insufficient to support the inference that the death was thus caused. An indentation in shell ballast near the end of such rail is adopted as the pivotal circumstance leading to the necessary inference, it being supposed that this indentation was made by Preston's heel on the tragic occasion of his death, but the proof that this was a heel print or that it was made by Preston rather than someone else is wholly circumstantial and devoid of probative value as will elsewhere be shown. It was a stormy night, being the night of the severe storm that wrecked the city of Corpus Christi, Texas, and the effect of the storm was felt in Houston. Other circumstances suggesting how Preston might have met his death will be exhibited as alternative to those relied upon for this recovery. He had on a long overcoat which might in some way have gotten caught as he alighted from the car in question. The severe

wind might have upset him. He might otherwise have stumbled. It will be submitted that there is no more room here for an inference of negligence as a proximate cause of Preston's death than is found in the Coogan case, *supra*, where it was claimed that the deceased caught his foot under an air pipe line and a mark on one of his shoes was utilized as indicating the manner of his death.

2. This suit was filed on February 26, 1920. On May 31, 1922, it was attempted to substitute James C. Davis, Federal Agent, in lieu of Walker D. Hines, Director General of Railroads. The Act of Congress entitled "An Act to Prevent the Abatement of Certain Actions," approved February 8, 1899, remained at the time in full force and effect and was applicable, precluding the attempted substitution. By reason of its provisions, the action abated and Petitioner submits that, after such abatement, any steps taken as against the Federal Agent amounted to the beginning of a new action. The enactment of Congress, effective March 3, 1923 (42 Stat. L. 1443), was, of course, not then available. To now have the benefits of this last-mentioned statute, Respondent must indicate that the action was "properly commenced within the period of limitation prescribed," this being the requirement of the statute of 1923, as prerequisite to the relief from the provisions of said Act of February 8, 1899, requiring substitution within one year after retirement of the predecessor.

Therefore an inquiry arises as to whether or not the action was thus "properly commenced" within the

prescribed period of limitation. It has been the contention of Petitioner throughout the case that it was not "properly commenced," and, furthermore, that it was not thus commenced *within the prescribed period of limitation,* which contention, if sound, would of necessity lead to the conclusion that the one-year statute would have to apply, thus voiding the jurisdiction of the State Court *in toto,* not to mention the bar of limitations, which is presented as a separate ground of error.

In overruling this contention and in upholding the substitution and the jurisdiction of the State courts under the circumstances, the Supreme Court of Texas has denied the Petitioner his rights, privileges and immunities under both the statutes above mentioned. More than two years following the termination of Federal control elapsed before the substitution was attempted and when it was accomplished Mrs. Preston was suing individually and had never qualified as Administratrix. Some months later she qualified as Administratrix and intervened in the lawsuit. An inquiry as to whether or not the suit was "properly commenced" would involve the question whether or not it was necessary for the suit to have been brought by an Administratrix within the two-year period of limitations prescribed by the statute.

3. The Transportation Act of 1920, as already indicated, establishes a two-year period of prescription with reference to causes of action arising out of Federal control of railroads (41 Stat. L., 461). Subdivi-

sion (*d*) thereof provides that "actions, suits, proceedings and reparation claims of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the Agent designated by the President of the United States under subdivision (*a*)." It is the contention of Petitioner that the substitution attempted in compliance with this statute, more than two years after termination of Federal control, was ineffective, for the reason, not only that the one-year statute mentioned in the next preceding paragraph would be controlling, resulting in an abatement, but, further, because the two-year period of prescription found in subdivision (*a*) of Section 206 of the Transportation Act became applicable due to the abatement and prescribed, *not only the remedy, but the right of action also.* Since this is a suit against the Government, the litigant is required to closely follow the conditions set forth in the applicable statutes through the medium of which the consent of the Government to be sued is conveyed. It is submitted as a logical construction of the statute that Congress did not intend that a lawsuit *filed against the Director General* should be allowed to sleep on the docket of any court for an indefinite period of time long past the period of prescription set forth in the Act, then to be brought forth for trial with the right at any time before satisfaction of the judgment to avail of the substitution privilege. The ruling of the Supreme Court of Texas to the contrary deprives Petitioner of his right, privileges and

immunities under the 1920 Transportation Act, particularly in respect to the scope and effect of the provisions thereof establishing the period of prescription.

As an important factor in this problem, we mention again that suit was filed as against the Director General on May 26, 1920. The Court judicially knows that Federal control ended at 12.01 a. m., March 1, 1920; also that on March 11, 1920, the President designated Walker D. Hines as the first Federal Agent. It was May 31, 1922, when the first effort to accomplish substitution was made. During that period Walker D. Hines resigned as Federal Agent and John Barton Payne was appointed as his successor and Payne in turn resigned and James C. Davis was appointed. Again it should be noted that up to the time of trial, suit had proceeded in the name of Mrs. Preston individually and not as Administratrix. After all parties had rested and all of the evidence was in, the qualification and intervention of Mrs. Preston as Administratrix occurred, all of which was much more than two years following termination of Federal control.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Texas, commanding that Court to certify and send to this Court for its review and determination, on a day to be named, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 188, James C.

Davis, Federal Agent, *et al. vs.* Mrs. Mary Preston, Administratrix, and that the said decree of the Supreme Court of Texas may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JAMES C. DAVIS, FEDERAL AGENT,
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By SIDNEY F. ANDREWS,
W. L. COOK,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 188

JAMES C. DAVIS, FEDERAL AGENT, ET AL.,
PETITIONERS,

VS.

MRS. MARY PRESTON, ADMINISTRATRIX, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Texas in this cause has not yet been published in the Official Reporter. It is found in the record of this cause at pages 130-136, inclusive.

II.

Jurisdiction.

1. The judgment of the Supreme Court of Texas was entered March 27, 1928, and the order of said Court overruling the motion for rehearing was entered on April 24, 1929 (R., 136). Under the Constitution and statutes of Texas, the Supreme Court of Texas is the Court of last resort in that State, and the overruling of the motion for rehearing terminated the litigation and established a final judgment, from which relief is sought in this Honorable Court.

2. Mrs. Mary Preston, as Administratrix, recovered a judgment against James C. Davis, Federal Agent, in the amount of $3,750.00, with interest and Court costs added (R., 34). The recovery is held as under Federal Employers' Liability Act based upon the death of W. P. Preston, deceased, who was a switchman in the employment of the Director General of Railroads on Houston Belt & Terminal Railroad at Houston, Harris County, Texas.

The jurisdiction of this Court is invoked under the provisions of the United States Judicial Code, paragraph (*b*), Section 237, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 937; U. S. C. A., Title 28, Section 344).

The rights, privileges and immunities in issue under Federal statutes are stated in the petition and it thereby appears just how the issues arose. This may

be briefly restated as follows:

(*a*) The action being one for damages on account of death alleged to have been negligently caused to an employee engaged in interstate commerce, it is now presented that the evidence was insufficient to take to the jury the issue of negligence as a proximate cause of the death.

(*b*) The action is pending as against the Federal Agent, the suit having been originally filed on February 26, 1920, against the Director General of Railroads. No substitution of a Federal Agent for the Director General was attempted until May 31, 1922, or more than two years after the termination of Federal control of railroads. The President had successively appointed two Federal Agents, who had retired from office prior to this time. Furthermore, when this substitution was formally ordered by the trial Court on May 31, 1922, Mrs. Preston had not been qualified as Administratrix and was not suing as such. It was months later, upon the trial, after the evidence was all taken and the parties had rested, that she intervened through the medium of a trial amendment and, for the first time, as Administratrix sued James C. Davis, Federal Agent. It is the contention of Petitioner that the suit abated, due to the application and effect of the statute of February 8, 1899.[1] It is further the contention of Petitioner that the Act of March 3, 1923,[2] invoked by respondent, could not be effective to avoid

[1] See Appendix, p. 29. - 32
[2] See Appendix, p. 30. - 33

the abatement in any event, unless the action as originally brought was "properly commenced" within the meaning of such statute. It is the contention of Petitioner that if it was necessary to sue by Administratrix in order to meet the demands of the statute, the abatement under the one-year's statute was accomplished, and there could be no relief under the subsequent statute. Of course, the necessity for suit by Administratrix arises out of the fact that the decedent met his death while engaged in interstate commerce. This draws into effect the Employers' Liability Act (35 Stat. 65, C. 149 (Comp. St. Sections 8657-8665)).

(*c*) The Transportation Act of 1920 contains a two-year prescription provision against actions arising during Federal control of railroads (See Transportation Act, 1920, Sec. 206; 41 Stat. L., 461).[3] Petitioner contends the present action is reached by that prescription. Incidental questions arise. One is the effect to be given in this connection to the Act of February 8, 1899.[4] Under it, this action abated in any event one year after the retirement of the first Federal Agent, which, as the Court judicially knows, occurred on May 14, 1920, at which time the President appointed John Barton Payne as Federal Agent in lieu of Walker D. Hines, who had previously held the position. After abatement, the action was open to limitations and the prescription of both the Employers' Liability Act and of the Transportation Act of 1920 would reach the right of action as well as the

[3] See Appendix, p. 26. - 32
[4] See Appendix, p. 26. - 32

remedy. In this connection and as meeting the contention of Respondent that the Act of March 3, 1923, would relieve this situation, attention is called to the holding of this Court that such a statute cannot be given retroactive effect if limitation has already barred the right of action. (See *William Danzer & Co., Inc., vs. Gulf & S. I. R. Co.*, 268 U. S. 663, 45 Sup. Ct. Rep. 612).

Taking up *seriatim* the foregoing issues as outlined, we present them as briefly as practicable consistent with clearness and accuracy.

As to the Issue of Negligence and Proximate Cause.

The essence of the allegation of negligence proximately causing the death of the decedent is that he had been furnished an unsafe place to work, particularly due to the presence of a steel rail alongside the track, against which he is alleged to have tripped or stumbled as he tried to alight from a string of moving cars; thus being caused to go under said cars and meet his death (R. 12 and 20). The record also shows that the Federal Agent, by his attorneys, requested the Court to give a peremptory instruction in his behalf, which was refused (R. 28).

The seventh assignment of error as presented in the brief on appeal in the Court of Civil Appeals, and carried forward into the proceedings on writ of error before the Supreme Court of Texas, reads as follows:

> "The trial court erred, to the prejudice of appellant, in refusing the request of James C.

> Davis, Federal Agent, for a peremptory instruction, because it wholly failed to appear from any evidence that the death of plaintiff's husband was proximately caused by any negligence of the Director General of Railroads, or any of his agents, servants or employees."

This assignment is found in the Record at page 37. In the petition for writ of error before the Supreme Court of Texas this same matter is found presented on pages 97-8 and on pages 102-119 of the record.

To draw the attention of the Court as directly as possible to the issue as to the sufficiency of the proof, we first call attention to the statement found in the opinion of the Supreme Court of Texas on this subject. We quote from the opinion as appearing in the Record, at page 134, as follows:

> "The evidence plainly supported the finding that the Director General by his agents was negligent in leaving a ninety pound iron rail about a foot and a quarter from the coach steps where it was apt to be encountered by a switchman in alighting from the train and walking beside the track in the performance of his regular duties. With evidence disclosing the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail, with his duties requiring his next step to be made about where he would be tripped by the end of the rail, especially while combating a thirty-five miles an hour wind, and with his cap and lantern found about where they would have fallen upon his being tripped by the rail, and with his body

> actually caught and mangled beneath the cars as they proceed a short distance farther; there being no evidence of anything save the rail to reasonably account for Preston's fall beneath the train; we would not be justified in holding as a matter of law that a recovery should be denied his administratrix on the issue of proximate cause'' (R. 134).

Passing by entirely the question of negligence in having the ninety-pound rail alongside the track, which was evidently there for replacement, we attack the problem solely from the standpoint of proximate cause. The Supreme Court of Texas says that the evidence discloses the point at which Preston stepped from the coach by the imprint of his heel on the ground about two and a half feet from the end of the rail. We challenge this as not supported by any evidence. It appears that after Preston was found dead, the members of the train crew noted this particular indentation in shell ballast and talked about it, groping, as it were, for some explanation as to how Preston met his death. But the proof is lacking in any convincing quality that this was a heel print in the shell ballast, and furthermore, if it be admitted that it was a heel print, there is no proof whatever that it was Preston's heel print, because it becomes necessary to assume what it is sought to prove, in order to arrive at this conclusion. In other words, it is necessary to suppose without proof that Preston attempted to alight from a moving string of cars in near proximity to the rail in question and made the claimed heel print.

But the Court says that it was Preston's duty to alight at such point and that his next step would be made about where he would be tripped by the end of the rail. The proof does not support such an inference. The only evidence as to the work Preston had to do indicated that this work would be performed some one hundred or more feet down the track beyond where this supposed heel print was found (R. 44). In other words, he was required under his duties to make a coupling and he could have ridden more than one hundred feet farther along and alighted at the point where the coupling was to have been made. It is true there was some testimony that it was customary for the members of the switching crew to alight in the vicinity of McKinney Avenue, and this heel print was not far away from the intersection of McKinney Avenue over a series of railroad tracks (R. 51-2).

The Supreme Court of Texas refers to the thirty-five mile an hour wind as a factor supporting somewhat the contention that it was Preston who made this heel print, and that his stumbling against the steel rail caused his death. With a thirty-five mile gale blowing and Preston having on a long rain coat extending below his knees (R. 62), it is submitted that it is not essential to suppose that he stumbled against this steel rail, when he might easily have gotten his rain coat caught or been unbalanced by the wind, or he might have slipped and fallen.

The Supreme Court also refers to the cap and lantern. Certainly with a thirty-five mile gale blowing, it would not be expected that a hat would remain at the

point where it had fallen, and the same might be said of a lantern. But allowing for whatever probative force the location of these objects at the time they were found has, nevertheless, it would have to be admitted that if Preston fell, however it may have occurred, his hat and lantern would have been dropped somewhere near the point of the fall, and all that the hat and lantern would indicate would be that he did fall and had to turn them loose, and would not indicate how he was caused to fall.

A factor that the Supreme Court of Texas overlooks entirely is that the supposed heel print might easily have been made by other members of the crew or by members of the public in the vicinity of McKinney Avenue, or by the crossing watchman or by other railroad employees. The evidence clearly shows this possibility and there is no evidence to indicate that Preston made this heel print, unless the mere fact of his being crushed to death under these cars is such evidence (R. 44, 46, 65).

To support the foregoing analysis, which presents as fully as need be the respective contentions of the parties on this question of the sufficiency of the evidence, we now make certain references to the record. The engine foreman under whom Preston worked explained that this was a Santa Fe train that had come in from the North handling interstate passengers destined for Galveston, and, on account of the brewing storm, the equipment was to be held over night at Houston in the coach yard to be carried on to destina-

tion the next day. The passengers were disembarked at Houston under the circumstances (R. 60).

Preston was with Moore, the section foreman, in the fourth car from the engine, as the switch engine pulled this empty passenger train toward the coach yard. The movement required that the train cross McKinney Avenue. As the train approached McKinney Avenue, Preston got up and went to the front door and out it, and was not seen any more until he was found dead (R. 61). The train had to go quite a distance beyond McKinney to reach the crossover switch, where it was backed up on what was termed the "rip" track. There was a car on this rip track and the crew had to couple into it and shove it along beyond McKinney Avenue in order to leave room on the near side of McKinney Avenue for this passenger equipment. This car was eighty feet long and the near end of it toward McKinney Avenue was about thirty feet from the street line. Thus, the point where the coupling had to be made was one hundred and ten feet from McKinney Avenue crossing (R. 64). There is a plat attached to the record which reflects with reasonable accuracy the conditions on the ground. It was shell ballast all the way from the intersection at McKinney Avenue down to where this coupling had to be made (R. 64). There is no controversy about any of the matters we have just stated. There is indeed little controversy about any of the evidentiary facts, the controversy being as to the conclusions to be drawn therefrom.

Preston was found dead about two blocks, or a little more than that, south of McKinney Avenue and near

the Milby Street crossing (R., 62). The engine foreman, Moore, missed Preston first when it was necessary to make the coupling in question. Moore made this coupling and then walked around the standing car to a point near McKinney Avenue, when some one came up bringing a hat and asked if it were not Preston's. Inquiry developed that Preston had been found dead near Milby Street crossing (R. 45).

It appears that Houston Belt & Terminal Railway Company maintained a coach yard near McKinney Avenue and that switching crews had to make more or less frequent trips to this point with passenger equipment. Moore, the engine foreman, says it was customary for the long field man, this being the position that Preston occupied, to get off near McKinney Avenue. This is also corroborated by the other witnesses, but there is no statement that such custom was controlling under circumstances such as on the occasion in question, where a coupling had to be made as described.

The civil engineer's description of the situation on the ground with measurements, as intended to be shown by the plat attached to the record, is found in the Record at page 80. We do not deem it necessary to elaborate this testimony, but we give the reference in case the Court should desire to consult this testimony.

With reference to the hat and lantern, the testimony seems to be that these objects were found about the same distance from McKinney Avenue as the steel rail in question, and it appeared that the end of the steel rail was about 12 to 20 feet from the street line

(R. 79). The string of cars that killed Preston was moving on the outbound main line. The testimony as to the hat and lantern placed these objects on or beyond the inbound main line. The two main-line tracks were fourteen feet apart. With reference to the heel print, the engine foreman said that he found what looked like a heel print, but he could not say it was Preston's (R. 47). He also stated it was raining and that the wind was blowing about thirty-five miles an hour and that Preston had a rain coat on which struck him down below the knees (R. 41).

The engine foreman also stated that he, with his crew, had been down in the vicinity of McKinney Avenue a short while before and that some of the men got off before that and that one of them could have made this heel print getting off at that place when he stepped off on that occasion. He also stated that the watchman walks back and forth at that point and that coach repairers also walk in that vicinity, and that they also have a track walker that walks the track (R. 65).

Other witnesses who testified were J. S. Cloud, a member of the crew with Preston, A. H. McDaniel, who was also a member of the crew, and J. B. Quarles, who was a railroad employee, but not a member of the same crew with Preston, but he was in the vicinity the night Preston met his death, working as a car man. It was Quarles who found the hat. He said: "I am not clear on just where I found the hat unless it was between the tracks of the inbound main; that is the best I can recall." Another witness, T. C. Morris, the

crossing flagman at McKinney Avenue, also testified. These constitute all of the witnesses who gave any testimony at all material to this inquiry.

None of these witnesses saw the accident. There is no testimony available to meet the demand for proof that Preston stumbled against the steel rail in question, except through the medium of this supposed heel print. Some of the witnesses apparently reached the conclusion that it was Preston's heel print, but, of course, they didn't know. Others, as for instance the engine foreman, expressed the view that while Preston might have tripped on this rail, he also might have gotten his rain coat caught or his clothes caught, or otherwise been killed. The witness J. S. Cloud said: "He could have stepped off and hit the rail and fell, or could have stepped off and got his clothing caught or could have stepped off and slipped and gone under the wheels. There are a half dozen ways it could have happened; you don't know how many ways a man can be hurt by a railroad until you get hurt about fifteen times. It was just like I say, we did discuss that theory; in other words, we could not swear to nothing because we did not see him. The fact of the case is nobody could swear what side he got off, as far as that is concerned, because we don't know. It was dark and rainy" (R. 54-55).

The witness A. H. McDaniel said he examined along the tracks for signs all the way from McKinney Avenue down to Milby Street and that he found no marks showing evidence that Preston had been dragged (R. 56). He noted the foot print with the others that

night. He also found pieces of clothes and little pieces of flesh on the crossing boards at Milby Street. They were in the middle of the track on the north side of Milby on the outbound main line (R. 57).

The witness Quarles in talking about the heel print said it was not a perfect print of a heel, but it looked something like one. He would not undertake to swear that it was a heel print (R. 75). The watchman saw it, but he said you could not tell definitely how long it had been made. All that was undisputed was that it looked like a heel mark and it looked to be fresh (R. 78). This watchman also told about the violence of the wind. He said he had a slicker on and when the train cleared him so the wind could blow on him, he had to jump around to keep from falling over (R. 78). With reference to the location of the heel print and the place where the hat and lantern were found, he testified as follows:

> "I judge that heel mark that was talked about there that night was a few feet just across and off of the planking that protected the McKinney Street crossing, it has been so long, but I judge it was somewheres between twelve and maybe twenty feet, just a short distance off the planking. The place where I saw the hat and lantern was further over to the left, but just about the same distance from McKinney Street. The mark I saw that was talked about as the heel mark was between the two main line tracks, but that was to the left of the outbound one; then the hat and lantern were farther over to the left still, and about the same distance from McKinney Street" (R. 79).

We rely upon the application and effect of the decision of this Court in the case of *Chicago, M. & St. P. Ry. Co. vs. Coogan,* 271 U. S. 472, 46 Sup. Ct. Rep. 564. In that case Coogan met his death underneath a train. An effort was made to show negligence, particularly in respect to the dangerous proximity of a pipe, and the issue of proximate cause was sought to be supported by a mark on Coogan's shoe. Analysis resulting in the rejection of the contentions supporting liability will apply with much force in this case, the circumstances and issues being strikingly similar.

As to the Issue of Abatement.

It has already been indicated that this suit was originally filed against the Director General on February 26, 1920, and that no effort at substitution was made until May 31, 1922. The Act of February 8, 1899, is copied in the appendix.[5] This was a statute designed to prevent the abatement of certain actions. This statute has been held applicable by this Court to actions by or against the Federal Agent appointed by the President to wind up the affairs of the United States Railroad Administration. In the case of *John Barton Payne, Director General, vs. Industrial Board of Illinois,* 42 Sup. Ct. 462, certiorari brought by the Federal administration was dismissed for want of jurisdiction in a *per curiam* opinion, citing this statute and the case of *LeCrone vs. McAdoo,* 253 U. S. 217-219. The applicability of this statute was recog-

[5] See Appendix, p. ~~29.~~ 32.

nized by Congress in passing the Winslow Act, amending the Transportation Act of 1920, which amendment became effective March 3, 1923. The Winslow Act is copied in the appendix.*

The first Federal Agent was appointed on March 11, 1920, Walker D. Hines being the appointee. He retired from this office and on May 14, 1920, the President designated John Barton Payne as the successor Federal Agent. He in turn retired and on March 26, 1921, the President designated James C. Davis as Federal Agent. Thus more than one year elapsed after the retirement of Walker D. Hines and of John Barton Payne, who in turn held the position of Federal Agent, and yet there was no substitution. Furthermore, there was no substitution of James C. Davis until more than one year after his appointment and assumption of the duties of his office.

Under these circumstances, it is the contention of Petitioner that this action abated. Certainly this is true unless the Act of March 3, 1923 (the Winslow Act), can be invoked to relieve the situation. But does this Act reach the situation? Petitioner contends that the action was not properly commenced because, under the terms and provisions of the Federal Employers' Liability Act, Mrs. Preston was required to bring her action as Administratrix, because her deceased husband met his death while engaged as an employee in furtherance of interstate commerce. No suit was brought by Administratrix until November of 1922. This was long after the lapse of two years

* See Appendix, p. ~~90~~ 33

prescribed in the Transportation Act of 1920, and it is one of the provisions of the Winslow Act that it would apply only to actions "properly commenced" within the period of limitation..

It is said that the principle found in *M. K. & T. Ry. vs. Wulf,* 226 U. S. 576, would be applicable. This holds that suit brought under the Federal Employers' Liability Act by the individual survivor can later be amended to sue by Administratrix, and that the original action would be sufficient to stop the running of the statute. It is also contended that it is the complete test of whether or not the action was "properly commenced" within the meaning of the Winslow Act, if it be determined whether or not it was brought in such form as to stop limitations. Petitioner contends that such was not the purpose of Congress in requiring that the action be properly commenced, and that the requisites are not met unless the action shall have been brought in such form that all outstanding liabilities would be taken care of should judgment be entered upon the pleadings. This evidently was in mind when it was provided that substitution might be accomplished at any time prior to satisfaction of the judgment.

It does not appear that this Court has passed upon exactly this point, that is to say, whether or not suit by an individual is sufficient within the meaning of this statute, when the suit properly should have been brought by Administratrix.

As to the Two-year Period of Limitations.

Under the decision of this Court in *William Danzer & Co., Inc., vs. Gulf & S. I. R. Co.*, 268 U. S. 633, 45 Sup. Ct. Rep. 612, it cannot be doubted that the two-year period of prescription set forth in the Transportation Act of 1920 reaches the right of action as well as the remedy. In that case this Court construed Section 206 (*f*) of the Transportation Act, which provided that the period of Federal control should not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control. But it so happened that under the applicable statute of the State of Mississippi, and prior to the passage of the Transportation Act, the cause of action asserted by William Danzer & Company was barred if the period of Federal control should be included in the period of prescription. An effort was made to invoke the provisions of 206 (*f*) of the statute, and this Court held that such provisions could not be given retroactive effect upon a right of action already barred. In like fashion, Petitioner presents that the Winslow Act cannot be given retroactive effect upon a cause of action already barred. Due to the abatement, which undoubtedly was accomplished under the statute of February 8, 1899, limitations reached this cause of action. When the Winslow Act was passed, therefore, the entire right of action had already passed out of existence. Like contentions might be made under the

period of limitations prescribed in the Federal Employers' Liability Act, but the result is the same.

Wherefore, because there was no sufficient evidence to take the cause of action asserted to the jury, because the cause abated and was not revived, and because following abatement the bar of the statutes of limitation prescribed the right as well as the remedy, the several courts of Texas have erred to the prejudice of your Petitioner and relief is asked at the hands of this Court.

Respectfully submitted,

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James C. Davis, Federal Agent.

APPENDIX.

An Act Entitled "An Act to Prevent the Abatement of Certain Actions," Approved February 8, 1899, c. 121, U. S. Compiled Statutes of 1916, Section 1594.

No suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs.

(See Brief, pp. 14, 15 and 25.)

Paragraph (a), Section 206, Transportation Act of 1920, as Amended February 24, 1922, 41 Stat. L., 461.

Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent

shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier; except that actions to enforce awards made by the Commission under the provisions of subdivision (*c*) against the agent so designated by the President may be brought within one year after the date of the Commission's award.

(See Brief, p. 15.)

The Winslow Act, Paragraphs (h) and (i), Section 206, Transportation Act of 1920, 42 Stat. L., 1443.

Actions, suits, proceedings, and reparation claims, of the character described in subdivision (*a*), (*c*), or (*d*), properly commenced within the period of limitation prescribed, and pending at the time this subdivision takes effect, shall not abate by reason of the death, expiration of term of office, retirement, resignation, or removal from office of the Director General of Railroads or the agent designated under subdivision (*a*), but may (despite the provisions of the Act entitled "An Act to prevent the abatement of certain actions," approved February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of such final judgment, decree, or award, the agent designated by the President then in office. Nor shall any action, suit, or other proceeding heretofore or hereafter brought by any public officer or official, in his official capacity, to en-

force or compel the performance of an obligation due or accruing to the United States arising out of Federal control, abate by reason of the death, resignation, retirement, or removal from office of such officer or official, but such action, suit, or other proceeding may (despite the provisions of such Act of February 8, 1899), be prosecuted to final judgment, decree, or award, substituting at any time before satisfaction of any such final judgment, decree, or award the successor in office.

Orders providing for a substitution in such cases made before this subdivision takes effect by courts having jurisdiction of the parties and subject matter are hereby validated, anything in such Act of February 8, 1899, to the contrary notwithstanding. Actions, suits, reparation claims, or other proceedings of the character described in subdivision (*h*) which have been abated or dismissed solely because of the provisions of such Act of February 8, 1899, shall be reinstated upon reasonable notice to the adverse party, and upon proper motion therefor filed within one year from the time this subdivision takes effect.

(See Brief, pp. 14 and 25.)